

No. 101

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Supreme Court of the United States

October Term, 1905

DORA SUBOWIEK,

Individually and on behalf of all other similarly situated shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, **CHARLES E. HILTON, ROBERT F. WILLIFORD, ROBERT J. JOYNER, JOSEPH F. KINGS, STEAM, MILLER, EDWARD J. HARRIS, HORACE C. FLANNERY, EDWARD E. HARRIS, E. J. HARRIS, FREEMAN, WILLARD W. KITE, LAWRENCE HARRIS, EDWARD D. YOUNG, FRANK E. BROWN, VERNON HARRIS, EDWARD C. BLUMCK, CHARLES L. HARRIS, EDWARD A. GROVES, JOSEPH A. HARRIS, HARRIS HARRIS AND HILTON CREDIT CORPORATION,** a corporation,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 161

DORA SUROWITZ,

Individually and on behalf of all other similarly situated
shareholders of **HILTON HOTELS CORPORATION,**

Petitioner,

vs.

HILTON HOTELS CORPORATION, a corporation, **CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHHOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON HILTON AND HILTON CREDIT CORPORATION,** a corporation,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS

NATURE OF THE CASE.

The instigator of this case is not before this Court. Instead, a puppet plaintiff has been induced to execute a false verification. This is established by a comparison

of petitioner's verification of the complaint with her sworn testimony on deposition. Condonation of such conduct will nullify the adversary concept of jurisprudence and Rule 23(b) of the Federal Rules of Civil Procedure.

The only suit which could be affected by the judgment of the Court of Appeals herein is one in which, as here, a false affidavit was filed by a puppet plaintiff who had, quite literally, no idea whatsoever of the general nature of the wrongful acts alleged, nor of her relationship to the suit, nor of the official identity of the defendants charged with serious wrongs. It is that amalgam of false affidavit *and* puppet plaintiff that makes essential the duty of this Court to enforce the Federal Rules of Civil Procedure, not to encourage nor discourage stockholder litigation, not to advance nor to hinder the enforcement of the Securities Acts, but to establish standards of conduct for *all* plaintiffs that will prevent fraud upon the Federal Courts.

QUESTIONS PRESENTED

Petitioner's brief states the "Questions Presented" as if the dismissal here was based upon her ignorance and lack of sophistication. (Pet. Br. 2).

It is respectfully suggested that the questions presented here are as follows:

1. The complaint was verified by a plaintiff who had no knowledge, information, understanding, or familiarity concerning its accusatory allegations or its subject matter. Were the trial court and Court of Appeals correct in holding that such a verification in a stockholder's derivative action which stated under oath that the affiant had either

knowledge, or information and belief, as to all allegations of the complaint is a false verification and a violation of the requirements of Rule 23(b)?

2. If a plaintiff in a derivative action files a false verification in violation of Rule 23(b) and refuses to substitute a proper verification, is the trial court correct in dismissing the action?

3. Does the adversary concept of litigation require that a plaintiff, who files and verifies in her own name a stockholder's derivative suit charging gross misconduct by corporate managers, have some concept of the nature of her charges, or are puppet plaintiffs to be condoned in lawyer-investment counsel instigated litigation?

STATEMENT OF THE CASE.

Petitioner devotes seven pages (Pet. Br. 4-11) to a summary of the allegations and charges contained in the complaint itself (as distinguished from the petitioner's verification of the complaint). These allegations and charges have no relevance on this appeal. No issue is presented concerning the truth or falsity of any of the charges in the complaint. The appeal concerns only the correctness of the legal determination by both the trial judge and the Court of Appeals that petitioner both failed to comply with the verification requirements of Rule 23(b) and also filed with the court a pleading containing an utterly false verification. The facts of this case compel the conclusion that the decisions of the lower courts were correct.

1. The Verification

The truthfulness and sufficiency of the verification is the central issue in this appeal, yet petitioner's brief nowhere quotes the language of that critical oath, which is as follows:

"Dora Surowitz, being first duly sworn, on oath deposes and states that she is the plaintiff in the above-entitled cause, that she has read the above and foregoing Complaint by her attorneys subscribed and is familiar with the matters therein alleged; that as to the matters alleged in [33 specified paragraphs of the complaint] said allegations are true and correct. That as to all other matters alleged in the above and foregoing Complaint, she makes said allegations on information and belief and believes them to be true."
(R. 64)

In this verification petitioner swore to the truth of the following matters: (1) that she had read the complaint and was familiar with the matters therein alleged; (2) that of *her own knowledge* the allegations in 33 specified paragraphs of the complaint were true; (3) that *she* possessed information as to the truth of each other allegation of the 91 page complaint and that *she* believed each such allegation to be true.

The sworn testimony of Mrs. Surowitz herself demonstrates conclusively that as to each of these matters her verification was utterly untruthful.

2. The Petitioner's Deposition

Petitioner's deposition, as the trial court and the Court of Appeals found, demonstrated conclusively the sham character of the verification, and of this case as brought by the named plaintiff. The actual testimony of Mrs. Surowitz makes clear Mrs. Surowitz' status as a puppet in this case and her utter lack of any knowledge, information, understanding or belief concerning the subject matter of the complaint.

Petitioner has attempted, by omission, by misstatement and by interpolation of factual matters from sources other than her own deposition to convey the impression that petitioner had some knowledge and understanding of the subject matter of her complaint, and has been penalized by dismissal of her suit solely because she lacked such education or sophistication as would permit her to comprehend the intricacies of corporate finance. Nothing could be further from the facts of this case. *Petitioner had no knowledge or understanding of the basis of her suit.*

a) Plaintiff's Testimony Demonstrated That She Had No Familiarity with the Subject Matter of the Action Even on the Most General or Rudimentary Level.

In addition to questions about specific allegations of the complaint, referred to below in b) and c), the petitioner was asked a series of questions concerning the subject matter of the action *in general*, and the basis of the serious charges she had made against the officers and directors of the corporation. Her answers confirmed the falsity of her verification, and demonstrated that she had so accepted the role of a puppet that she had *no familiarity* with these charges or *with the subject matter of the action*, even in the most general or rudimentary way.

Mrs. Surowitz testified that she did not know any of the individual defendants and had no conversations or correspondence with them, with the exception of the protest letter. (R. 100-101) When she was asked if she knew anything at all about the individual defendants which would indicate that they were not in her judgment men of honesty and integrity, she responded:

"I don't know anything about them." (R. 101)

She made this response despite the fact that the complaint she filed and verified charges these defendants with deliberate violations of a number of federal statutes, with disregard of their fiduciary obligations, and with a scheme to make substantial personal profits at the expense of their corporation—in short, with serious dishonesty.

Thereafter, on the same subject, Mrs. Surowitz was asked:

"Do you know of any action, wrongful or improper, done by any officers or directors of Hilton Hotels Corporation?" (All emphasis herein is supplied unless otherwise noted.)

Her response contains her sole effort to explain her understanding of the subject matter and charges in the complaint. She stated:

"I couldn't—all I know is that my stock wasn't right and that's all." (R. 105)

Yet charges of wrongdoing by those officers and directors constitute the gist of the complaint. Further, petitioner's standing to bring the action is predicated upon the contention that these alleged acts of misconduct gave rise to a corporate cause of action which the officers and directors of the corporation refuse to prosecute. Mrs. Surowitz knows nothing about or against any of these officers and directors, not even their failure to prosecute "her" cause of action.

On examination by her own counsel, Mrs. Surowitz testified, in response to leading questions, that she received from Hilton Hotels Corporation the documents attached to the complaint as Exhibits A, B and C, and that she turned these documents over to Mr. Brilliant. (R. 109) She did not indicate that she understood that these documents had any connection with the litigation or what the connection might be.

This testimony shows more than mere lack of "sophistication." It demonstrates that petitioner so completely accepted her role as a puppet that she never troubled to obtain even the most rudimentary information as to what "her" derivative action was all about. In this state of complete ignorance she recklessly filed an utterly false affidavit of verification.

b) Petitioner Did Not Know Facts Relating to the Allegations Which She Swore Were True as of Her Own Knowledge and Did Not Even Understand Such Allegations.

Mrs. Surowitz gave her home address and stated that she had owned, since about 1957, 100 shares of the stock of Hilton Hotels Corporation.* (R. 94, 96)

Thereafter, Mrs. Surowitz' response to *all* questions relating to the allegations she had sworn she *knew to be true* consisted substantially of "*I don't understand it and I don't know nothing about it.*" **No objection to the form of any question answered by petitioner was made by either of her two counsel present.**

Mrs. Surowitz was asked to state the basis upon which she swore to the correctness of the allegations to the effect that the individual defendants had control over the affairs of Hilton Hotels Corporation (paragraph 6 of Counts I, II, III, IV and V**). She answered:

"I don't understand it and I don't know nothing about it." (R. 102)

Petitioner's brief does not mention this question and answer, either in its "Statement of the Case" or in the argument concerning "Petitioner Truthfully Verified the Allegations Upon Which Her Standing to Sue Rests" (Pet. Br. 31-34) even though the fact of control is obviously relevant to the adequacy of the demand on the corporation and consequently to petitioner's standing.

* Even on this point Mrs. Surowitz was confused, since she incorrectly testified that the stock had been held in her own name throughout this period.

** The questions were phrased in the language of the Complaint which Mrs. Surowitz had sworn she **knew** to be true. For brevity this brief refers merely to Count and paragraph numbers.

Mrs. Surowitz was then asked about the allegations that a corporate offer to purchase stock dated December 17, 1962 contained certain reasons why the offer was being made and no other statement of reasons (paragraph 7 of Counts I, II, III, IV and V). She responded:

"I don't know nothing. I don't understand this and I don't know. I can't answer you on that. I don't know." (R. 103)

With respect to the allegation that the action was not a collusive one instituted to create jurisdiction in the District Court (paragraph 5 of Count VI), Mrs. Surowitz responded:

"I don't know. I can't tell." (R. 104)

Mrs. Surowitz was asked to state the facts upon which she swore to the truth of the allegations that she had protested to the defendant corporation against the gross impropriety of the acts set forth in the complaint (last sentence of paragraph 13 in Counts I, II, V and VI, the last sentence of paragraph 14 of Counts VII, VIII and XI, and last sentence of paragraph 12 of Counts IX and X). To a number of questions with respect to these allegations, she replied:

"I don't know." "I don't know nothing about it."
 "I don't know. I can't answer you on that neither because I don't know." "I can't. I don't know." "No, I don't understand it." (R. 103-104)

A few minutes before she made these answers, Mrs. Surowitz had identified her signature on a letter of protest (Defendants' Surowitz Deposition Exhibit No. 1) which had been sent in her name to Hilton Hotels Corporation. (R. 97) Counsel for the petitioner contend that this letter

was the basis for the allegations in the complaint that a protest had been made to the corporation. Mrs. Surowitz' disavowal of any knowledge concerning a protest only a few minutes after she had examined this letter, and her entire testimony, merely underscore her status as a puppet in this litigation. Such testimony compels the conclusion that she never understood the matters alleged in the complaint or the letter of protest which she signed at her son-in-law's direction. The lower courts so found.

The allegations verified as true of petitioner's own knowledge and referred to at pages 31-34 of petitioner's brief are only a portion of the allegations which Mrs. Surowitz swore she knew of her own knowledge to be true. Even as to the few allegations discussed in detail, the brief co-mingles answers given by Mrs. Surowitz in her deposition with assertions from the affidavits filed by Mr. Brilliant and her counsel and other material, in order to convey the impression that Mrs. Surowitz had some knowledge (however rudimentary) of the subject matter of the complaint. In fact, the record demonstrates the contrary.

- c) **Plaintiff Had No Information Upon Which To Form A Belief, and Did Not and Could Not Have A Belief, of the Truth of the "Information and Belief" Allegations, Which Allegations She Also Did Not Understand.**

Mrs. Surowitz was interrogated concerning the allegations as to which she had sworn she possessed information and believed to be true. She was first questioned about the allegation, made on "information and belief", that the explanation set forth in certain documents sent to shareholders of Hilton Hotels Corporation was false and misleading, and was *known by the individual defendants to be false and misleading* (paragraph 8 of Count I). She replied:

"I can't give it to you because I can't explain it to you and I don't know." (R. 105)

She was then asked to state the information upon which she formed the belief that defendants carried out a manipulative or deceptive device or contrivance as alleged in paragraph 8 of Count I. She replied:

"I can't explain it to you in my words. I don't know." (R. 105-106)

She was then asked concerning the allegation that the individual defendants were engaged in a plan and scheme to make it possible for them to dispose of shares in Hilton Hotels Corporation at prices more favorable than they could obtain in the market at a time when they knew or should have known that the business affairs of the corporation would shortly lead to a substantial drop in the value of the shares (paragraph 8(a) of Count I). She replied:

"I don't know. I can't explain it." (R. 106)

The second allegation of paragraph 8(a) of Count I charges that the individual defendants were engaged in a

plan and scheme to make it possible for the defendant Henry Crown to dispose of the large holdings in the common stock of Hilton Hotels Corporation held or controlled by him or his family, at prices above the market prices for such stock under circumstances whereby such disposal of stock would not become publicly known. Concerning the facts on which this allegation was based, Mrs. Surowitz stated:

"I don't know." (R. 106)

Mrs. Surowitz was then asked about the allegations that the individual defendants took the action previously described in such a way as to conceal from the corporation and the stockholders the true purpose of the offer to purchase stock, and in such a way as to make it appear that it was to the corporation's advantage to effect such a purchase of approximately 10 per cent of its outstanding shares (paragraph 8(b) of Count I). She replied.

"No, I don't know. I don't know." (R. 106-107)

These were all of the answers she gave concerning specific allegations of the complaint.

d) Petitioner's Answers Were Not the Result of the Technical Nature of Any Questions. Her Lack of Knowledge Was Total.

In this Court petitioner does not argue as a basis for reversal that Mrs. Surowitz' complete failure to indicate any understanding or information concerning the accusatory allegations of the complaint was based upon some failure of memory or the obscure nature of "technical questions" asked by counsel. The contention that "it was evident that Mrs. Surowitz had difficulty understanding several questions." (Pet. Br. 12-13) and other similar state-

ments scattered throughout the brief, however, represents an indirect effort to explain away Mrs. Surowitz' testimony on this ground. This attempted explanation of petitioner's testimony is utterly inconsistent with the record.

First, the uniformly uninformed character of Mrs. Surowitz' responses to all questions, complicated or simple, technical or non-technical, demonstrates to any reader of the deposition transcript that she possessed no secret knowledge waiting to be elicited by some more understandable or less complicated question.

Second, although two of petitioner's able counsel were present at the deposition, they did not object to the form of a single question answered by petitioner concerning the allegations of the complaint or the factual subject matter of the litigation. Having failed to object, the objection is waived. Rule 32(c) F.R.C.P. In addition, of course, the failure to object demonstrates that counsel believed that Mrs. Surowitz' answers accurately reflected the state of her knowledge and understanding.

Third, any such argument by petitioner's counsel is barred by their own stipulation. After the specific questions and answers summarized above, dealing with a few of the "information and belief" allegations of the complaint, the following took place:

(Mr. Block)

"Q. Do you know any facts, Mrs. Surowitz, at all upon which you based these allegations?

A. I don't know. I can't give you no facts because I don't understand it.

Mr. Block: Could we take a short recess, please?

(Whereupon a five-minute recess was taken.)

Mr. Block: Let the record show that Mr. Watt [counsel for plaintiff] and Mr. Block have now discussed the further questioning with respect to the information upon which the witness has formed the belief to which she swore and it is agreeable that I ask the following question:

By Mr. Block:

Q. Mrs. Surowitz, if I ask you about each of the other allegations of the complaint to which you have sworn on information and belief as being true and correct and that you believe them to be true and correct, your answer would be the same, would it not, that you have no information as to those?

A. I have no information because my son-in-law, I left it to him, and he was the one that knew all about it." (R. 107)

Plaintiff and her counsel thus conceded that she would respond to *any and all questions concerning the factual basis of any of the allegations in her lengthy complaint by a complete disavowal of any knowledge or information.*

Finally, although petitioner's own counsel undertook to examine her at the deposition, this examination elicited no testimony concerning any information, understanding, knowledge or belief by Mrs. Surowitz with respect to the subject matter of the action.

3. The Proceedings in the Trial Court Demonstrated the Determination of Petitioner's Counsel To Stand Upon the False Affidavit.

On the day following the Surowitz deposition, defendants presented to the trial court a motion to dismiss the action. In the colloquy between court and counsel at the

time the motion was presented, defendant's counsel clearly stated that the motion was based upon the demonstratively false character of the affidavit and upon plaintiff's failure to comply with the verification requirement of Rule 23(b). (R. 168-171). The trial court gave petitioner's counsel fifteen days to file such documents as counsel might think appropriate (R. 171-172). In response, petitioner's counsel merely filed the affidavits of petitioner's son-in-law, Irving Brilliant and Walter J. Rockler, one of petitioner's counsel. As the Court of Appeals properly concluded: "Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant knowledge or information other than the fact of her stock ownership." (R. 237-238).

All of the *facts* relating to *petitioner's* lack of knowledge, belief, or even understanding concerning her lawsuit have been referred to. They are contained in *her* affidavit and *her* testimony. Neither *her* affidavit nor *her* testimony, and assuredly not *her* knowledge, belief or understanding, are in any way changed by either the Rockler or the Brilliant Affidavit.

a) The Rockler Affidavit Is Irrelevant on the Issue of Whether or Not Mrs. Surowitz Filed a False Affidavit.

Mr. Rockler's affidavit is totally *irrelevant* to the question of the truthfulness of Mrs. Surowitz' affidavit. The Rockler affidavit shows that neither he nor any of petitioner's other counsel discussed the litigation or the complaint with petitioner prior to or at the time it was verified and filed. They dealt only with Mr. Brilliant. It was he who instructed them to draft the complaint. They forwarded the complaint to him and received it back with the verification form executed by Mrs. Surowitz (R. 142). The Rockler

affidavit therefore indicates that neither Mr. Rockler nor petitioner's other counsel had any knowledge with respect to the truthfulness of Mrs. Surowitz' verification.

b) The Brilliant Affidavit Is Similarly Irrelevant, But It Reveals The Genesis of the Litigation.

It appears from Mr. Brilliant's affidavit that he is everything Mrs. Surowitz is not. She is a "woman of limited education", a dressmaker who "reads very little English and has some difficulty in understanding English except with regard to ordinary day to day matters." She "does not have the education or experience to understand corporate and securities transactions." (R. 122). Brilliant, on the other hand, is a college graduate and a member of Phi Beta Kappa. In addition, he has a degree from Harvard Law School and a Master of Arts Degree in Economics from Columbia University. He has had ten years' experience "as an advisor to various individuals, institutions, and companies with regard to the proper investment of their funds." (R. 120).

While Mrs. Surowitz has not the slightest information or understanding with respect to the charges or subject matter of the complaint, Mr. Brilliant was the instigator and mastermind of this action. According to his affidavit, it was he who raised questions with respect to the two stock transactions referred to in the complaint. He personally conducted investigations at the New York Stock Exchange and communicated the results of those investigations to Mr. Rockler. It was Brilliant who instructed Rockler to prepare the complaint, with Mrs. Surowitz as plaintiff. (R. 122-124).

It also appears from the Brilliant affidavit that he, his wife and their families own in excess of 2,350 shares of the stock of Hilton Hotels Corporation, and that Brilliant himself is the record owner of some of these shares as trustee of a trust for his children or as the representative of his mother's estate. (R. 121).

The truth of these allegations would have led one to expect that this derivative action would have been brought by Mr. Brilliant himself, or, at the least that he would have verified the complaint. Instead, he procured his mother-in-law to act as plaintiff in the litigation, and told her that it "was reasonable to assume" that members of the family who own Hilton stock would "be willing to pay a major part of the expenses." (R. 123)

Brilliant does not relate the basis upon which he concluded that Mrs. Surowitz should verify the complaint or how her verification could be a truthful one. He states in conclusory fashion that he "explained" the complaint to Mrs. Surowitz, but gives no further details with respect to this "explanation." (R. 124). *He does not assert that he made any effort to ascertain whether Mrs. Surowitz had acquired sufficient information to enable her to make a truthful verification.* As the Court of Appeals found:

"Brilliant does state in his affidavit that he read the complaint to plaintiff before she signed it, but it seems obvious from her deposition that she had no conception of the matters read We think the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand." (R. 238).

Therefore, to the extent the Brilliant affidavit is relevant, it supports the dismissal of this action.

c) Neither the Brilliant Nor the Rockler Affidavits Could Constitute That Verification Required by Rule 23(b).

1. The Brilliant affidavit in no way resembles a verification. It does not affirm the truth of the allegations of the complaint, either on Mr. Brilliant's own knowledge or even on the basis of information and belief. In fact, the only reference to the allegations of the complaint is the concluding sentence of the affidavit:

"I told her [Mrs. Surowitz] that the charges in the complaint reflected the investigation and study of Mr. Rockler and myself and that, in my opinion, the charges of wrongdoing were soundly based." (R. 124).

In short, Mr. Brilliant, the instigator of this action, is unwilling to swear under oath that the charges made in his complaint are true, either of his own knowledge or on information and belief. While he permitted, indeed encouraged his mother-in-law to verify those charges, he confines his oath to the innocuous statement that he "told" *her* that they were soundly based. One can only conclude that petitioner's counsel were well-advised in the trial court and the Court of Appeals in *not* arguing that the Brilliant affidavit constituted a "verification" of the complaint.

2. Mr. Rockler's affidavit is equally defective, but for another reason. After affirming on knowledge and on information and belief the truth of the allegations of the complaint, he concludes the affidavit by the following reservation, which precludes the operation of the affidavit as a verification:

"This affidavit is made necessary by defendants' motion of February 26, 1964 and the proceedings in

court on that date; it is filed *solely* for the purpose of refuting incorrect and misleading implications therein. Counsel and the plaintiff do not in any respect agree to waive, and expressly reserve, the *attorney-client privilege and the confidential and privileged character of counsel's work products.*" (R. 143).

Mr. Rockler's carefully phrased escape clause in effect "rescinded" any possible verification that appeared in the earlier portion of the affidavit. This reservation effectively prevented any examination into the truth of Mr. Rockler's previously expressed belief in the soundness of the allegations of the complaint.

d) Even If the Rockler and Brilliant Affidavits Had Been Intended as or Could Constitute the Requisite Verification of the Complaint, Petitioner Has, at this Stage, Waived Any Right So To Contend.

On March 23, 1964, the motion to dismiss was argued orally before the trial court. During the course of argument, that court repeatedly suggested that additional parties plaintiff be added or that, in any event, a verification be made by some person other than Mrs. Surowitz. (R. 175-176, 178).

The Trial judge emphasized that the critical fact was the necessity that the verifier have sufficient knowledge and information to make a true verification, stating at one point:

"I appreciate on the record here that some resourceful lawyer, relative by marriage of the plaintiff, induced her to sign it [the complaint] but it seems to me that the preferable way to have gotten this complaint on file, if they wanted this woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr. Brilliant [the

financial adviser] who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff.

"It does occur on occasions that a plaintiff necessarily is a proper party, but does not have knowledge of all of the facts. *But if the plaintiff doesn't have knowledge, that plaintiff should not say that he or she does.*" (R. 175-176).

Later, when petitioner's counsel made one of his frequent references to the policy of the Securities Acts, the Court stated:

"Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

"You have got—it is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? That a person is ill at the time of the filing of a complaint doesn't say that she can't sign her name. It seems to me that would have been the simple way to do the thing properly." (R. 185).

But petitioner's counsel made no effort whatever to respond to the trial court's suggestions that they tender a proper verification. There was no motion to amend the complaint or to file a substitute verification.

The only response by petitioner's counsel to the trial court's suggestions was a stubborn insistence that Mrs. Surowitz' verification was not false and was sufficient to satisfy Rule 23(b).

Although the Rockler and Brilliant affidavits were on file and were referred to repeatedly by counsel during argument, it was never stated or even intimated that either

affidavit constituted or could be considered to constitute a substitute verification.

Thereafter, on March 27, 1964 there was extended argument before the trial court on proposed findings of fact and conclusions of law in support of an order dismissing the complaint. One of the findings of fact states:

"34. Plaintiff's counsel have not asked for leave to file a substitute verification or an amended complaint." (R. 156)

Paragraph 5 of the trial court's conclusions of law states:

"5. The verification of this complaint is false and sham and the complaint must be stricken. Since the plaintiff has not sought leave to substitute any other verification or filed an amended complaint the action will be dismissed." (R. 157)

In all of his lengthy attack on the proposed findings of fact and conclusions of law, counsel for petitioner never argued that those quoted above (Finding 34 and Conclusion 5) were either inaccurate or incorrect.

If one or both of the Rockler-Brilliant affidavits had been intended to verify the complaint, it was the duty of counsel at that time to make this intention clear to the trial court.

On appeal, for the first time, petitioner rather timidly suggested in one paragraph of her brief that it would involve "no unwarranted stretching of Rule 23(b) to treat Mr. Rockler's affidavit as a verification of the complaint." (Petitioner's brief in Court of Appeals, p. 54). The Court of Appeals quite properly held that, since the petitioner had chosen to stand on the Surowitz verification instead of submitting another verification to the trial court, the ques-

tion of Rockler's capacity to verify or the sufficiency of his affidavit as a verification was not before the court.

In this Court petitioner contends for the first time that *both* the Rockler and Brilliant affidavits ought to be considered as verifications.

On the dismissal of a complaint by a District Court a plaintiff has an election to amend as of right under Rule 15(a) FRCP or to stand on his complaint. If he appeals, he has elected to stand on the complaint and has waived his right to amend. *Wallingford v. Zenith Radio Corporation*, 310 F.2d 693, 696 (7th Cir. 1962); *222 East Chestnut Street Corp. v. Lakefront Realty Corp.*, 256 F.2d 513, 514-515 (7th Cir. 1958) cert. denied 358 U.S. 907 (1958); see also *Duane v. Altenburg*, 297 F.2d 515, 518 (7th Cir. 1962); *Asher v. Rupp*, 173 F.2d 10, 11 (7th Cir. 1949); *National Van Lines v. United States*, 326 F.2d 362, 366-367 (7th Cir. 1964). This rule is essential to the orderly administration of justice in the federal courts.

Petitioner's present theory of "substitute verifications" is an afterthought concocted by petitioner's counsel on appeal after they had deliberately confronted the district judge with the choice of accepting petitioner's false verification or dismissing of the action. Counsel now attempt to convince this Court that they should be able to shift their position on appeal and tender, as verifications, documents which were filed for completely different purposes.

4. The Decision of The Court of Appeals.

Throughout petitioner's brief there is a consistent effort to misrepresent the opinion of the Court of Appeals as one hostile to the Securities Acts, and to derivative actions generally. In fact, the opinion of the Court of Appeals reflects a clear understanding of the issues in this case, a

comprehension of the value and benefits to be derived from suits under the Securities Acts and derivative actions generally, and an understanding of the limited firsthand knowledge and sophistication of the many shareholder plaintiffs. The court concluded, after an extremely careful and fair analysis, that reversal in this case would not further these policies but rather that affirmance was required in order to avoid nullifying Rule 23(b) and condoning the filing of a false affidavit.

The nub of the opinion is the consideration and rejection of petitioner's general argument that the verification should be construed as truthful and sufficient because of Mrs. Surowitz' lack of education and "sophistication" and the related specific argument that the verification could not be considered false because two and one-half months had lapsed between the verification and the petitioner's deposition.* The court emphasized its intention of announcing a rule which would not deter or discourage shareholders acting in good faith. Thus the court stated:

"In most cases, the plaintiff in a shareholder's derivative suit is merely the instrument for bringing the suit to the court. By hypothesis, most such plaintiffs would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance. Most of them, also, would have to rely upon the opinions and advice of trained counselors for many of the principal allegations of such a complaint." (R. 234).

* This "time lapse" argument, incredible in the light of the complete lack of information or understanding evidenced by the deposition, has apparently been abandoned by petitioner in this Court.